



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245-AG79

Debt Refinancing in 504 Loan Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule implements Section 521 of Division E the Consolidated Appropriations Act, 2016, which authorizes projects approved for financing under Title V of the Small Business Investment Act to include the refinancing of qualified debt.

DATES: Effective Date: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment Date: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG79, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Linda Reilly, Chief, 504 Branch, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

Hand Delivery/Courier: Linda Reilly, Chief, 504 Branch, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the information to Linda Reilly, Chief, 504 Branch, Office of Financial Assistance, 409 Third Street, SW, Washington, DC 20416, or send an e-mail to 504refi@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Linda Reilly at linda.reilly@sba.gov or 202-205-9949.

SUPPLEMENTARY INFORMATION:

I. Background Information

The 504 Loan Program is an SBA financing program authorized under Title V of the Small Business Investment Act of 1958, 15 U.S.C. 695 et seq. The core mission of the 504 Loan Program is to provide long-term financing to small businesses for the purchase or improvement of land, buildings, and major equipment, in an effort to facilitate the creation or retention of jobs and local economic development. Under the 504 Loan Program, loans are made to small business applicants by Certified Development Companies (“CDCs”), which are certified and regulated by SBA to promote economic development within their community. In general, a project in the 504

Loan Program (a “504 Project”) includes: a loan obtained from a private sector lender with a senior lien covering at least 50 percent of the project cost; a loan obtained from a CDC (a “504 Loan”) with a junior lien covering up to 40 percent of the total cost (backed by a 100 percent SBA-guaranteed debenture); and a contribution from the Borrower of at least 10 percent equity.

The Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240, 124 Stat. 2504, enacted on September 27, 2010, temporarily expanded the ability of a small business to use the 504 Loan Program to refinance certain qualifying debt. Prior to the Jobs Act, a 504 Project could include a refinancing component only if the project involved an expansion of the small business and the existing indebtedness did not exceed 50% of the project cost of the expansion. See 13 CFR 120.882(e). The temporary Jobs Act program authorized the use of the 504 Loan Program for the refinancing of debt where there is no expansion of the small business concern (the “Debt Refinancing Program”). The regulations governing this program are found at 13 CFR 120.882(g) (referred to herein as “Current Rules”). SBA’s authority to guarantee loans under the Debt Refinancing Program expired on September 27, 2012.

Section 521 of Division E of the Consolidated Appropriations Act, 2016 (the Act), Public Law 114-113, enacted on December 22, 2015, reauthorizes the Debt Refinancing Program with three modifications:

(1) the Act provides that the Debt Refinancing Program shall be in effect in any fiscal year during which the cost to the Federal Government of making guarantees under the Debt Refinancing Program and under the 504 Loan Program is zero;

(2) the Act requires that a CDC limit its financings under the 504 Loan Program so that, during any fiscal year, new financings under the Debt Refinancing Program do not exceed 50% of the dollars the CDC loaned under the 504 Loan Program during the previous fiscal year. The Act provides that this limitation may be waived upon application by a CDC and after determining that the refinance loan is needed for good cause; and

(3) the Act eliminates the alternate job retention goal authorized by the Jobs Act for the Debt Refinancing Program.

As described in the section-by-section analysis below, this interim final rule modifies the Current Rules to conform the Debt Refinancing Program to the requirements of the Act. For an in-depth discussion of the Current Rules, please see the interim final rule and the final rule that were issued to implement the Debt Refinancing Program at 76 FR 9213 (February 17, 2011) and 76 FR 63151 (October 12, 2011). With this interim final rule, SBA invites comments from interested parties on all aspects of the Debt Refinancing Program.

The “zero cost” requirement described in (1) above is satisfied for Fiscal Year 2016. As announced in SBA Information Notice 5000-1352, effective September 28, 2015, “7(a) and 504 Fees Effective October 1, 2015,” the 504 Loan Program is operating at zero subsidy during Fiscal Year 2016, with a zero upfront fee and an annual guarantee fee of 91.4 basis points on the outstanding loan balance. To operate the Debt Refinancing Program at zero cost to the Federal Government during Fiscal Year 2016, SBA has determined that the Borrower must pay a supplemental annual guarantee fee of 4.4 basis points on the outstanding loan balance to cover the additional cost attributable

to the refinancing, for a total annual guarantee fee of 95.8 basis points. The supplemental fee for the Debt Refinancing Program will be assessed and collected in the same manner as the current annual guarantee fee under 13 CFR 120.971(d)(2).

Before the beginning of each new fiscal year, SBA will issue a similar notice indicating whether the Debt Refinancing Program will be in effect during the new fiscal year, in addition to any changes in the fees for 504 Loans.

With the “zero cost” requirement satisfied for Fiscal Year 2016, SBA will begin to accept applications for assistance under the Debt Refinancing Program upon the effective date of this rulemaking, [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

II. Section-by-Section Analysis

Except as set forth below, all other sections of the Current Rules are unchanged.

Section 120.882(g) Introductory Text. This section currently includes the application deadline for the Debt Refinancing Program. Since that date is no longer relevant, SBA is revising the introductory text in this section to remove the following phrase that is no longer applicable: “For applications received on or after February 17, 2011 and approved by SBA no later than September 27, 2012”. Also, with the permanent reauthorization of the Debt Refinancing Program by the Act, a specific application period is unnecessary.

Section 120.882(g)(3). In order to manage the limited resources that were available for the Debt Refinancing Program between 2010 and 2012, this section imposed a maturity date requirement on the debt to be refinanced that is no longer necessary. Accordingly, SBA is revising this section by removing this maturity date

requirement. In its place, SBA is inserting the Act's requirement that, for the Debt Refinancing Program to be in effect during any fiscal year, the cost to the Federal government of making guarantees under the Debt Refinancing Program and under the 504 Loan Program must be zero subsidy.

Section 120.882(g)(10). The Jobs Act authorized an alternate job retention goal for the Debt Refinancing Program for Borrowers that did not meet the job creation and retention goals under sections 501(d) and (e) of the Small Business Investment Act of 1958. The Act eliminates this alternate job retention goal and, accordingly, SBA is removing the alternate job retention goal provision from the regulations. With the elimination of the alternate job retention standard, all applicants for a loan under the Debt Refinancing Program will now be required to meet the job creation and retention goals under §§ 501(d) and (e). Based on these goals, a 504 Project, including a project financed under the Debt Refinancing Program, must achieve one of the economic development objectives set forth in 13 CFR 120.861 or 120.862.

The revisions to § 120.882(g)(10) will reflect the Act's requirement that a CDC limit its financings under the Debt Refinancing Program so that, during any fiscal year (October 1 to September 30), new financings under the Debt Refinancing Program do not exceed 50% of the dollars loaned by the CDC under the 504 Loan Program during the previous fiscal year. In making this calculation, the dollars will be deemed loaned by the CDC on the date that the 504 loan application is approved, which is when SBA obligates the funds for the 504 Project. The dollars loaned will be calculated as of September 30 of each fiscal year, which will reflect any increases or decreases to the approved 504 loan amount that occurred within that fiscal year. Because the Act provides that the 50%

limitation applies to the dollars loaned under the 504 Loan Program during the previous fiscal year, all financings made by the CDC during the previous fiscal year will be included in determining this number, including those financings made under the Debt Refinancing Program.

As authorized by the Act, § 120.882(g)(10) will provide that the 50% limitation may be waived upon application by a CDC and a determination by SBA that the refinance loan is needed for good cause. SBA will provide guidance regarding the good cause determination in its Standard Operating Procedures or other guidance documents.

Section 120.882(g)(13). This section prohibits the Third Party Loan from being sold on the secondary market as a part of a pool guaranteed under subpart J of part 120 when the debt being refinanced is same institution debt. Subpart J of part 120, the Secondary Market Guarantee Program for First Lien Position 504 Loan Pools, expired on September 23, 2012; however, should this program be reauthorized, SBA wants to ensure that this prohibition remains in effect. Accordingly, SBA is revising this provision to make it clear that the prohibition would apply to any successor to the program described in subpart J of part 120.

Section 120.882(g)(15) (Definition of “qualified debt”). To meet the definition of “qualified debt”, paragraph (vii) of this provision requires that the applicant be current on all payments due for not less than one year preceding the date of application. When SBA initially implemented the Debt Refinancing Program under the Jobs Act, it defined “current on all payments due” to mean that no payment scheduled to be made during the one year period was either deferred or more than 30 days past due. See 76 FR 9213 (February 17, 2011). In response to comments received, SBA revised this definition to

mean that no payment was more than 30 days past due from either the original payment terms or modified payment terms (including deferments) “if such modification was agreed to in writing by the Borrower and the lender of the existing debt prior to the (sic) October 12, 2011.” See 76 FR 63151 (October 12, 2011). This date was the effective date of the final rule for the Debt Refinancing Program under the Jobs Act, and was intended to ensure that no debt that was modified after the definition was revised would be refinanced under the program. SBA also reserved the right to determine, at its discretion on a loan-by-loan basis, whether modified repayment terms would preclude refinancing under the program.

The October 12, 2011 date is no longer relevant after the expiration of the Debt Refinancing Program in 2012, and SBA is removing it from the rules. However, SBA believes that a debt should not be considered “current on all payments due for not less than one year preceding the date of application” if the payment terms were modified during the one year period. Accordingly, SBA is revising this provision to require that the modification must have been agreed to in writing by the Borrower and the lender of the existing debt no less than one year preceding the date of application. As under the Debt Refinancing Program under the Jobs Act, SBA reserves the right to determine, at its discretion on a loan-by-loan basis, whether modified repayment terms would preclude refinancing under the program.

III. Justification for Publication as Interim Final Rule

In general, before issuing a final rule, SBA publishes the rule for public comment in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. The APA

provides an exception to this standard rulemaking process where the agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(c)(3)(B). The good cause requirement is satisfied when prior public participation can be shown to be impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment. In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency and other situations arise where an agency can issue a rule without public participation.

With regard to the Debt Refinancing Program, SBA finds that good cause exists to publish this rule as an interim final rule for two reasons. First, the public has already had the opportunity to comment on the rules implementing the Debt Refinancing Program and this interim final rule simply modifies these rules to conform the Debt Refinancing Program to the requirements of the Act.

Second, in order to meet the immediate debt refinancing needs of small businesses, it is essential to be able to implement the Debt Refinancing Program as expeditiously as possible. According to data presented to the Federal Open Market Committee before its January 2016 meeting, there is a concerning trend toward tighter credit sentiment by bank officers since the Debt Refinancing Program expired in 2012. The combination of tighter credit sentiment and the recent increase in interest rates has made it increasingly difficult for small businesses to find lenders willing to refinance small business commercial loans. The Debt Refinancing Program will fill that gap by providing an affordable refinancing product that lenders and the small business community are eagerly awaiting.

Although this rule is being published as an interim final rule, comments are solicited from interested members of the public. These comments must be submitted on or before the deadline for comments stated in this rule. The SBA will consider any comments it receives and the need for making any amendments as a result of the comments.

Compliance with Executive Orders 12866, 12988, 13132, and 13563, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)
Executive Order 12866

The Office of Management and Budget has determined that this rule does not constitute a “significant regulatory action” under Executive Order 12866. This rule is also not a major rule under the Congressional Review Act.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have preemptive effect or retroactive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Executive Order 13563

The Consolidated Appropriations Act, 2016, reauthorizes the Debt Refinancing Program, which was first authorized by the Jobs Act. The Agency received significant public comments on the interim final rule that was issued to implement this program (see 76 FR 9213, February 17, 2011). SBA considered and discussed these comments in the final rule that was published in the Federal Register on October 12, 2011 (76 FR 63151). To assist in developing that interim final rule, the Agency also held a public forum on November 17, 2010 in Boston, Massachusetts.

Except for the modifications to the Debt Refinancing Program made by the Act, the Agency is not making any other substantive changes to the Current Rules, codified at 13 CFR 120.882(g), in this interim final rule.

Paperwork Reduction Act

In order to re-establish the Debt Refinancing Program, SBA has determined that it is necessary to also modify two existing collections of information (OMB Control Number 3245-0071, *Application for Section 504 Loans* and OMB Control Number 3245-0346, *PCLP Quarterly Loan Loss Reserve Report and PCLP Guarantee Request*) to include the requirements to apply for and report on debt refinancing loans. These requirements were previously part of these collections but were removed following expiration of the temporary Debt Refinancing Program in 2012. OMB has approved the revised collections on an emergency basis to enable SBA to move forward with re-establishing the Debt Refinancing Program as expeditiously as possible. The Paperwork Reduction Act requires agencies to follow the standard approval process following receipt of an emergency approval. In light of that requirement, SBA will also publish the required notices in the Federal Register to solicit comments from the public on the

revised forms and will subsequently resubmit the collections of information to OMB for final review and approval. Any changes to the collection of information as a result of the comments will be reflected in that submission.

Regulatory Flexibility Act

Because this rule is an interim final rule, there is no requirement for SBA to prepare a Regulatory Flexibility Act (RFA) analysis. The RFA requires administrative agencies to consider the effect of their actions on small entities, including small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of these small entities. However, the RFA requires such analysis only where notice and comment rulemaking is required. As discussed above, SBA has determined that there is good cause to publish this rule without soliciting public comment. This rule is, therefore, exempt from the RFA requirements.

List of Subjects in 13 CFR Part 120

Loan programs-business, Small businesses, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, SBA amends 13 CFR part 120 as follows:

PART 120--BUSINESS LOANS

1. The authority citation for part 120 is revised to read as follows:

Authority: 15 U.S.C. 634(b) (6), (b) (7), (b) (14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3), and 697(a) and (e); Public Law 111-5, 123 Stat. 115, Public Law 111-240, 124 Stat. 2504; Public Law 114-113, 129 Stat. 2242.

2. Amend § 120.882 by revising paragraph (g) introductory text, paragraphs (g)(3), (g)(10), (g)(13), and the second sentence of paragraph (vii) in the definition of “Qualified debt” in paragraph (g)(15)(vii) to read as follows:

§ 120.882 Eligible Project costs for 504 loans.

* * * * *

(g) SBA may approve a Refinancing Project of a qualified debt subject to the following conditions and requirements:

* * * * *

(3) The cost to the Federal Government of making guarantees under this subsection (g) and under section 503 of the Small Business Investment Act of 1958 (15 U.S.C. 697) during the fiscal year in which the guarantee is made is zero;

* * * * *

(10) A CDC must limit the amount of its loans under this paragraph (g) so that, during any Federal fiscal year, the amount of the new loans approved under this paragraph (g) does not exceed 50% of the -total dollar amount of the CDC’s 504 loans approved (including the loans approved under this paragraph (g)) during the previous fiscal year. This limitation may be waived upon application by the CDC and upon a determination by SBA that the refinance loan is needed for good cause.

* * * * *

(13) The Third Party Loan may not be sold on the secondary market as a part of a pool guaranteed under subpart J of this part, or any successor to this program, when the debt being refinanced is same institution debt;

* * * * *

(15) * * *

Qualified debt * * *

(vii) * * * For the purposes of this paragraph (vii), “current on all payments due” means that no payment was more than 30 days past due from either the original payment terms or modified payment terms (including deferments) if such modification was agreed to in writing by the Borrower and the lender of the existing debt no less than one year preceding the date of application. * * *

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Maria Contreras-Sweet,
Administrator

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